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SUBJECT: 2007 SPECIAL 301 REVIEW - COSTA RICA

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1.(U) SUMMARY. Costa Rica is making progress in passing laws to protect intellectual property rights (IPR), but still falls short in the area of enforcement due to lack of resources and weak political will. Chapter 15 of the U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) contains important provisions to strengthen the legal and enforcement framework, but the treaty is not yet in force. The agreement was signed on August 5, 2004 (i.e., some two and a half years ago) and we expect ratification during the first half of 2007 and implementation before the February 29, 2008 deadline. Opposition by roughly one third of Costa Ricans including very strong opposition by a small but vocal minority has so far succeeded in delaying the treaty's ratification and implementation. However, significant progress has been made in the past eight months. President Oscar Arias is pursuing a dual track approach in the national assembly to simultaneously consider both ratification and passage of the necessary implementing legislation, including several new laws related to IPR. Meanwhile, post continues to successfully recruit candidates for IPR training from various sectors of the government including Costa Rica's Supreme Court, and local businesses are pursuing IPR educational initiatives. 2006 saw the first IPR enforcement case that resulted in a conviction in many years. Taking all of these factors into consideration, Post recommends that Costa Rica remain on the Watch List (WL). End Summary

TRIPS COMPLIANCE AND LEGISLATIVE ISSUES

[1](#)2. (U) Since inclusion on the Priority Watch List (PWL) in 2001, the GOCR has sought to improve its legal framework for protection of IPR and most importantly has significant new legislation necessary to implement CAFTA under active consideration. Costa Rica brought into force the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) on March 6, 2002 and May 20, 2002, respectively. Costa Rica has also ratified the Patent Cooperation Treaty (PCT). Despite these ratifications, Costa Rica's IPR legal regime is noncompliant on certain TRIPS provisions. Areas of concern are Costa Rica's lack of strongly defined time periods of protection and insufficient criminal sentences. However, these issues are addressed in several pending bills required to bring CAFTA-DR into force, bills that have been the subject of many weeks of legislative hearings in late 2006. The IPR bills are included on a priority agenda for legislation action, and post expects the IPR legislative package to be enacted before the end of 2007. It is likely that these bills will take effect even before CAFTA-DR actually comes into force.

ENFORCEMENT

13. (U) Despite significant progress being made in the legislature in recent months, industry sources remain very concerned with the small degree of enforcement of existing laws. Costa Rican laws provide for both criminal and civil enforcement of IPR. The Attorney General is widely quoted as saying that given the workload his office faces with limited resources, IPR prosecutions are a low priority. Industry sources say the Attorney General has recommended that private civil actions be pursued. However, the civil system is viewed as inadequate due primarily to the difficulties in establishing damages. Further, the amount of statutory damages is too small to serve as an incentive to pursue civil actions. Accordingly, the vast majority of matters are brought through the criminal system. One case, involving a defendant accused of selling t-shirts with a fake trademark, was successfully prosecuted in late 2006. However, because it was his first criminal conviction, the defendant received a suspended sentence as required under Costa Rican law. Moreover, the IPR community was disappointed that local media failed to report the conviction, which might have served as a disincentive to other IPR violators.

14. (U) The Ministry of Public Security has a special organized crime division to combat organized and trans-national crimes occurring in Costa Rica. The unit focuses on gangs, child sexual exploitation, stolen car smuggling, and a wide range of other miscellaneous crimes. Within that unit there are a handful of employees dedicated to investigating IPR violations.

15. (U) The chief prosecutor's office (Fiscalia General) is divided into several branches dedicated to particular crimes. Under the current system, IPR crimes fall to a unit designated as "all other crimes." Due to IP's inclusion in this unit that covers a wide variety of unrelated criminal activity, the prosecution of IP-related crimes is adversely affected. Their varied workload means individual prosecutors have difficulty acquiring the specialized knowledge and expertise necessary for successful IPR prosecutions.

16. (U) Post management has regularly stressed the importance of IPR enforcement when meeting with Costa Rica's chief prosecutor, Francisco Dall'Anese. While he says he recognizes the importance of IPR enforcement, Dall'Anese additionally states that due to the limited resources of his office, he could not make IPR enforcement a priority. The prosecutor believes he faces strong public pressure to focus attention on other "more important" areas (e.g. prosecution of corruption scandals involving three former presidents, bribery allegations involving the government's telecom monopoly, drug trafficking and organized crime). Dall'Anese indicates that attention to these other areas is necessitated by internal realities, whereas IPR enforcement is generally viewed as stemming solely from bilateral or multilateral obligations such as WIPO and CAFTA-DR. Dall'Anese, whose term expires at the end of 2007, has suggested that one remedy might be the creation of an effective administrative process designed solely for the right holder to procure a seizure of goods without further criminal prosecution.

17. (U) Another enforcement problem involves gathering and validating evidence. Even when a search warrant is issued, upon entering a manufacturer, vendor, or distributor of counterfeited goods, investigators can only seize those goods that are counterfeits of the company that presented the complaint. Thus, while counterfeit goods of several brands may be present, only those of one brand may be taken as evidence. Furthermore, a company that has submitted a complaint must send an expert witness to Costa Rica to testify that the pirated goods are indeed different than the original. Because of the small size of the Costa Rican market, this often is not worthwhile to the affected companies.

18. (U) Post believes that there are two specific areas of improvement in enforcement that would greatly enhance IPR protection. First, a dedicated and specialized prosecutor's IP unit should be established separate from the various crimes unit. Although this might not be feasible in all judicial districts of the country, the creation of a unit serving the San Jose metropolitan area would greatly increase the efficiency of enforcement. Second, increased resources should be provided to the IP investigatory unit of the Ministry of Public Security so that they can expand the efficiency and quality of their

services.

¶9. (U) The Arias administration has voiced a commitment to improved enforcement of IPR laws, but so far this has not been accompanied by additional appropriations. Budgetary constraints have forced the GOCR to make difficult decisions regarding the allocation of available funds. Currently, although parts of the GOCR recognize the need for improvements in IPR enforcement, other areas of enforcement are given a higher priority. One basis for this prioritization is the widely held view that IPR enforcement mainly serves the interests of foreign corporations. Some GOCR officials hope that through greater local participation in IPR issues and continued education and public outreach programs, adequate resources might eventually be committed.

CREATING A POLITICAL ENVIRONMENT CONDUCTIVE TO IPR ENFORCEMENT

¶10. (U) Building upon past training initiatives, post has actively recruited numerous candidates for various IPR training programs offered by the U.S. Patent and Trademark Office. Costa Rica's National Registry refers patent review work to the University of Costa Rica's office known as PROINNOVA. This year for the first time post sent two industrial design engineers and the general counsel from PROINNOVA to USPTO courses on industrial design review and advanced patent law, respectively. In addition post recruited key personnel from the Ministry of Foreign Trade to attend a course about copyright in the digital age. It was significant that for the first time post recruited five members of the judiciary, including members of the Supreme Court, to participate in IPR enforcement conferences and training to better understand the country's obligations under CAFTA-DR. One member of the Supreme Court has become so interested in IPR issues that he is pursuing academic training in the field and told Econoff he is working on a special IPR project for the Supreme Court.

¶11. (U) Efforts to educate and create IPR interest groups are in the gestation stage. Industry sources report development of an informal network of professionals with IPR interests. The local American Chamber of Commerce is working with the U.S. Chamber of Commerce on a pilot project to assess public attitudes towards IPR, with a public education campaign to be based upon survey results, similar to an IPR project the U.S. Chamber of Commerce funded in Brazil. As public interest in IPR protections grows, the political will to take enforcement seriously is more likely to take hold.

USE/PROCUREMENT OF GOVERNMENT SOFTWARE

¶12. (U) In 2002, Executive Decree #30, 151-J mandated that all government ministries use only legally licensed computer software. According to this decree, each ministry was to conduct an internal audit and submit a statement of compliance no later than July 31, ¶2003. The government subsequently claimed full certification of all ministries, although there has been no independent confirmation.

RESPONSE TO PUBLIC COMMENTS

¶13. (U) All public comments that post has seen to date, including those from the IIPA, IACC and PhRMA recommend that Costa Rica be moved from the Watch List to the Priority Watch List. These postures reflect the high level of frustration over IP enforcement post shares with many firms trying to do business in Costa Rica. While readily acknowledging these difficulties, we nonetheless believe that such a move now would be counter-productive to our long-term goals by lessening the probability that Costa Rica will be able to ratify and implement CAFTA-DR. Among the laws necessary to implement the treaty, the IPR legislative package has not generated public opposition like that which exists for opening the telecom and insurance monopolies. IPR bills required by CAFTA-DR are moving forward in the legislative process and have made significant progress. It appears likely that these bills will be passed and may even take effect regardless of whether CAFTA-DR is ultimately brought into force.

COMMENT AND RECOMMENDATION

¶14. (SBU) What has been most lacking in the past in Costa Rica is political will. President Arias has made ratification and implementation of CAFTA-DR his highest priority. He and his cabinet are exercising strong leadership to confront obstructionists in the legislature and the opposition of powerful unions. Post believes that bringing CAFTA-DR into force is by far the most effective way to obtain the IPR protections sought by industry. Costa Rica has to implement significant IPR legislation to bring CAFTA into force by the Feb. 29, 2008 deadline. That means that the USG will have a very clear picture of what Costa Rica's IPR regime will look like for many years before the next 301 report is due. Given the real possibility for significant improvement during 2007 in legal guarantees for intellectual property under Costa Rican law, post favors maintenance of the status quo for one more year. In the event that the GOCR is unable to implement the significant IPR legislation required under CAFTA before the next 301 review, we likely would strongly encourage moving Costa Rica to the Priority Watch List at the next review. For the above reasons post recommends Costa Rica remain on the Watch List in 2007.
FRISBIE